IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' JAMES PROFFER PURSUANT TO RULE 801(d)(2)(E)

Pursuant to the Court's Order of November 13, 2007, the United States submits the following proffer supporting admission of coconspirator statements pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence.

I. Introduction

Count One of the Indictment charges the Defendants with violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to rig bids submitted to BP America Production Company ("BP America") for the construction of pipelines to transport natural gas from its wells in the Upper San Juan Basin in Colorado to elsewhere in the United States. The conspiracy began in or about June 2005 and continued until December 2005.

In order to assist the Court in its preliminary determination of the admissibility of

coconspirator statements at trial, the United States submits this proffer, which will outline some of the evidence the United States intends to present at trial.[1] Section II of this proffer provides a brief overview of the conspirators, the victim of the conspiracy, and the bid rigging conspiracy charged in Count One of the Indictment. Section III outlines the law governing the admissibility of coconspirator statements. Section IV sets forth alternative bases for admission of some of the statements. Attached as Exhibit A is a chart describing coconspirator statements that the United States will seek to introduce at trial.[2] As does the description of the conspiracy contained in this memorandum, the chart proffers sufficient evidence to establish, by a preponderance of evidence, the existence of the conspiracy and membership of the Defendants in that conspiracy.

The evidence set forth in this proffer, though not exhaustive, proves, by a preponderance of evidence, that: (1) the charged conspiracy existed; (2) each defendant was a member of the conspiracy; and (3) certain statements of the coconspirators were made during the course of and in furtherance of the conspiracy.

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[1] The United States is not detailing all of its evidence showing the existence of the conspiracy to rig bids charged in the Indictment.

[2] In preparing Exhibit A, the United States reviewed the discovery produced to the Defendants to identify the statements which are likely to be introduced at trial pursuant to Rule 801(d)(2)(E). Nonetheless, the United States recognizes the possibility that coconspirator statements which have not been identified in Exhibit A may be offered at trial. If such statements arise at trial, the Court can assess them at that time.

II. Overview of the Conspirators, the Victim of the Conspiracy and the Charged Bid Rigging Conspiracy

A. The Defendants

1. B&H Maintenance and Construction, Inc.

B&H Maintenance and Construction, Inc. ("B&H") is a New Mexico Corporation. It is a wholly-owned subsidiary of Infrastrux Group, Inc. which is owned by Tenaska Power Fund L.P. B&H's corporate headquarters are located in Eunice, New Mexico, and it has branches in Bloomfield and Carlsbad, New Mexico; and Odessa, Texas. Co-defendant's Jon Paul Smith and Landon Martin, employees of B&H who work in its Bloomfield office, submitted rigged bids on behalf of B&H pursuant to the conspiracy charged in Count One of the Indictment. B&H participated in the conspiracy through the actions of its agents, Defendants Smith and Martin.

2. Jon Paul (J.P.) Smith

J.P. Smith is Vice President of B&H and General Manager of its Bloomfield office. He has worked for B&H since November 1998. Smith supervises the activities, including the preparation and submission of bids to customers, of the Bloomfield office. Smith was an agent of B&H and therefore B&H is liable for his actions.

3. Landon Martin

Landon Martin is the Manager of Marketing and Business Development in B&H's Bloomfield office. He reports to J.P. Smith. In the course of his job Martin is involved in determining the bid prices and submitting B&H's bids for pipeline construction work. Martin has worked for B&H since January 1999. Like Smith, Martin was an agent of B&H and therefore

B&H is liable for his actions. Furthermore, because Smith supervised Martin, Martin was also an agent of Smith and therefore Smith is liable for Martin's actions.

B. The Coconspirators

1. Flint Energy Services, Inc.

Flint Energy Services, Inc. ("Flint") is a Delaware corporation, with its corporate headquarters located in Tulsa, Oklahoma. Flint is a wholly-owned subsidiary of Flint USA Inc. which is a wholly owned subsidiary of Flint Energy Services Ltd. of Calgary, Alberta, Canada. Flint has various regional offices, including one located in Farmington, New Mexico. Coconspirator Kenneth L. Rains managed Flint's Farmington office and submitted rigged bids on behalf of Flint pursuant to the conspiracy charged in Count One of the Indictment. On August 7, 2006, Flint plead guilty to participating in a conspiracy with the Defendants to rig bids that were submitted to BP America Production Company ("BP America") as Count One of the Indictment.

2. Kenneth L. Rains

During the period of the conspiracy charged in Count One of the Indictment, Kenneth L. Rains ("Rains") was the Regional Manager of Flint's Farmington office. Rains supervised all aspects of Flint's Farmington office, including the preparation and submission of bids to customers. On August 7, 2006, Rains plead guilty to participating in a conspiracy with the Defendants to rig bids that were submitted to BP America as charged in Count One of the Indictment.

C. The Victim of the Conspiracy

The victim of this conspiracy, BP America, is, among other things, engaged in the

business of finding, drilling for and supplying natural gas. Once natural gas wells are drilled, a series of pipelines is necessary to bring the natural gas from BP America's wellheads to consumers throughout the United States. BP America has an office in Durango, Colorado which oversees its operations in the Upper San Juan Basin in Colorado. During the time period of the bid rigging conspiracy charged in Count One of the Indictment, BP America solicited competitive bids for the construction of pipelines in the Upped San Juan Basin. In the Summer and Fall of 2005, BP America had pre-approved two companies to submit bids for the construction of pipelines in the Upper San Juan Basin area: B&H and Flint.[3] During the time period of the conspiracy, BP America's Durango office requested that B&H and Flint submit bids on various pipeline projects. The bids were submitted to BP America's Houston office, which handled the commercial aspects of the bids. Some bids were submitted on paper via mail or other commercial interstate carrier and some were submitted electronically via the Internet. B&H and Flint submitted rigged bids on nine projects.

D. Overview of the Conspiracy to Rig Bids

Count One of the Indictment charges Defendant B&H and two of its employees, Defendants J.P. Smith and Landon Martin, with conspiring to rig bids submitted to BP America for the construction of pipelines in the Upper San Juan Basin in Colorado. Defendants Smith and Martin were agents of and acted on behalf of Defendant B&H. B&H, Smith and Martin

[3] In recognition of the danger involved in building pipelines to transport natural gas and the need for those pipelines to work properly, BP America pre-approved companies to bid on its pipeline projects based on quality of service and safety records.

conspired with Flint and its employee, Rains. The conspiracy began in or about June 2005 and continued as late as December 2005.

At trial, Rains will testify that there was a conspiracy to rig bids submitted to BP America for the construction of natural gas pipelines and that he directly participated with Defendants Smith and Martin in this conspiracy. This direct testimony about the existence and operation of the conspiracy from Rains, an individual who participated in the conspiracy with the Defendants, will establish well beyond a preponderance the requisite foundation for the admission of testimony by Rains about statements by Defendants Smith and Martin to him in the course of and in furtherance of the conspiracy. *United States v. Owens*, 70 F.3d 1118, 1125 (10th Cir. 1995) (citations omitted) ("[A] coconspirator's testimony regarding 'direct observations and contacts with defendant' qualifies as independent evidence."); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 871 (10th Cir. 1989) ("The direct testimony of a conspirator (Jacobs) describing his participation in the conspiracy and the actions of others is not hearsay. . ."). Furthermore, the Court may consider the proffered statements themselves in determining whether they should be admitted as coconspirator statements. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987). Finally, Rains' testimony will be corroborated by documents and the testimony of other witnesses.

Rains will testify that the conspiracy to rig bids submitted to BP America began sometime in late June or early July 2005 when BP America sought bids for two projects, Bayfield and Salvador. Rains was interested in doing the Salvador project which called for the use of 10" pipe. However, Rains did not want to bid on the Bayfield project which called for the use of 20"

pipe. Rains knew that in order to do this job Flint would have to rent equipment because Flint did not have equipment at its Farmington location capable of dealing with the 20" size pipe that the Bayfield project required. Therefore, Rains told a BP America employee that Flint did not intend to submit a bid for the Bayfield project. However, the BP America employee made it clear to Rains that the company expected Flint to submit a bid on the Bayfield project.

Rains will testify that instead of submitting an independently determined bid for the Bayfield project, he reached out to Defendant Smith, Vice President of B&H, his only competitor. Rains explained to Smith that Flint was not interested in the Bayfield project but was interested in the Salvador project and proposed that they work something out. Rains and Smith had several telephone conversations regarding the Bayfield and Salvador projects and eventually arranged to meet for breakfast at a restaurant in Bloomfield, New Mexico.

At the breakfast meeting Rains told Smith that Flint would submit a bid for more than $1 million on the Bayfield project. Smith told Rains that B&H would be right at $1 million on the Bayfield project. Smith also let Rains know that B&H was not interested in winning the Salvador project. Rains will testify that when he left the breakfast meeting, he and Smith had reached an understanding that B&H would win the Bayfield project and that B&H would not be competitive on the Salvador project.

Both B&H and Flint submitted bids to BP America for the Bayfield and Salvador projects. True to their agreement, B&H's bid for the Bayfield project was $1 million while Flint's bid for Bayfield was $1.1 million. BP America awarded the Bayfield project to B&H, the low bidder. Flint was the low bidder on the Salvador project and was awarded that contract.

Over the next several months, Rains ran into Smith on several occasions. Rains will testify that during these unplanned meetings he and Smith talked about the need to get their profit margins up. They also agreed to talk the next time BP America solicited bids.

BP did not let any more pipeline projects until September 2005 when it put five projects out for bid: the Lash Ute/Southern Ute[4], Martinez, Schofield and Buford Waytt projects. All of these five projects called for smaller diameter pipe and both companies could do all of the projects. Smith and Rains had a conversation during which Smith told Rains that he figured all of the projects would go to Flint. But Rains told Smith Flint did not have the personnel to do all five projects. Smith said he would take the projects that Rains didn't want and to let him know. On the morning of September 23, 2005, in preparation for his discussion with Smith, Rains had asked Richard Putman, a field superintendent for Flint, which three of the five projects Putman would most like to do. Putman told Rains he would prefer to do Lash Ute/Southern Ute and Martinez.

Rains will testify that on September 23, 2005, the day the bids were due, he had a telephone conversation with Smith about the five upcoming bids. Smith told Rains to call Defendant Martin to get the prices that B&H was intending to bid on those five projects. Smith gave Rains Martin's cell phone number which Rains wrote on the summary sheet for the Martinez project.

Rains hung up with Smith and immediately called Martin. Rains told Martin that Smith

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[4] The Lash Ute/Southern Ute projects were separate projects, but were often referred to in combination.

had told him to call for the bid numbers. Martin gave Rains B&H's bid numbers for the five projects. Rains will testify that Martin was not surprised that Rains had called; had the numbers for the five projects available; and quickly gave them to Rains.

Rains wrote B&H's bid number for the Lash Ute/Southern Ute project on Flint's worksheet for the project. He also wrote B&H's bid numbers for the Martinez, Schofield and Buford Waytt jobs on Flint's worksheets for those jobs. Documents produced by BP America confirm that the numbers that Martin gave to Rains on September 23 and which Rains wrote on Flint's bid worksheets, match, almost to the dollar, the bid numbers submitted by B&H on September 26, 2005.

After Rains talked to Martin, he adjusted Flint's bid prices on the bid worksheets so that Flint's bids were below B&H's on Lash Ute/Southern Ute and Martinez, and above B&H's on Buford Waytt and Schofield. Rains gave the bid worksheets to Jerry Freeman, Flint's estimator, and instructed him to submit the adjusted bid prices to BP America. Freeman wrote on the bid worksheets that the new prices that he had been instructed to bid were "Per Kenny." That same day Freeman entered the bid prices into the computerized bidding program that BP America used, and electronically submitted the bids to BP America's office in Houston, Texas. B&H submitted its bids electronically to BP America in Houston, Texas on September 26, 2005. BP America awarded the Lash Ute/Southern Ute and Martinez projects to Flint, the low bidder on those projects, and the Buford Waytt and Schofield to B&H, the low bidder on those projects.

Freeman was very concerned that Rains had dramatically increased the amount of several of the bids and so after he submitted the five bids to BP America, he asked several Flint

employees why Rains had increased the bids. Rains will testify that he heard that Freeman was questioning the increased bid prices and to quiet talk he told Freeman that it was his decision what price Flint bid and that sometimes he tested the market by submitting higher prices.

In October 2005, BP America sought bids for the Mayfield and Sauls Creek projects. Again Smith and Rains discussed these projects and split the projects between their two companies, deciding that Flint would win Sauls Creek and B&H would win Mayfield. Flint and B&H submitted bids to BP America according to their agreement, but BP America awarded both of the projects to B&H. Rains will testify that after Smith found out that B&H had been awarded both projects, Smith called Rains to assure him that Smith had not "screwed over" Flint. Smith offered to meet Rains and show him B&H's bid on the Sauls Creek project to prove that B&H had not cheated on the agreement.

Because they did not want to be seen together in Flint's offices, Rains and Smith met in the parking lot of the Sun Ray Casino and horse race track across the street from Flint's office. They sat in Rains' vehicle and went over B&H's bid on the Sauls Creek project. True to the agreement, B&H's basic bid price on Sauls Creek was higher than Flint's. However, the way that certain contingency items were bid by Flint resulted in it having a potentially higher total price and apparently BP America had awarded the contract to B&H based on the contingency pricing. Rains will testify that because of this experience, Flint changed the way it bid contingency items–instead of bidding actual prices, it now bids "time and materials."

In November 2005, BP America requested bids from B&H and Flint for the Webb-Reader project. Rains and Smith had discussions concerning this project, but since only one project was

being let at that time they were not able to agree on which company should win the bid.[5] Therefore, both companies submitted independently determined bids, and Flint was awarded this project.

The conspiracy ended in early December 2005, when Jeff Kramme, a Flint employee, told John Mummery of BP America and, later, Paul Boechler, President of Flint, that Rains and Smith were rigging the bids submitted by Flint and B&H to BP America.

III. Law Governing the Admissibility of Coconspirator Statements

Statements of a collaborator in an illegal venture have unique evidentiary value, rarely capable of duplication in live testimony at trial. *United States v. Inadi*, 475 U.S. 387, 395-96 (1986). Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that an out of court "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy." Regardless of a statement's independent reliability or the declarant's availability, coconspirator statements are not hearsay and are admissible if the United States establishes, by a preponderance of evidence, that: (1) the charged conspiracy existed; (2) the defendants and the declarants were members of that particular conspiracy; and (3) the statements were made during the course of and in furtherance of the conspiracy. *Bourjaily*, 483 U.S. at 175; *Owens*, 70 F.3d at 1123.

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[5] "To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another. . ." *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1189-90 (3rd Cir. 1984) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940)).

In order to convict the defendants of a criminal violation of 15 U.S.C. § 1 in this case the United States must prove: that there was a conspiracy to rig bids; that the defendants participated in the conspiracy; and interstate commerce.

A. The Proper Standard for Admissibility Is Preponderance of the Evidence

The standard for a district court's preliminary determination of admissibility under Rule 801(d)(2)(E) is a preponderance of the evidence standard. *Bourjaily*, 483 U.S. at 175-76. The preponderance of the evidence standard merely means "more likely than not." *Id.* at 175. In ruling on the admissibility of coconspirator statements, the Court is authorized under Federal Rule of Evidence 104(a) to consider any evidence whatsoever except priviledged material, unhindered by consideration of admissibility. *Id.* at 178-79. Thus, the trial court may rely on the putative coconspirator's declaration to determine that the conspiracy existed and that the declarant and the defendants were parties to the conspiracy. *Id*. at 180. In other words, as the Tenth Circuit has "repeated . . . time and time again in [its] decisions," the Court can examine the hearsay statements that are being sought to be admitted in determining the statement's admissibility pursuant to Rule 801(d)(2)(E). *Owens*, 70 F.3d at 1124.

Because of the nature of the evidence generally uncovered to prove criminal conspiracies, "wide latitude is allowed [the prosecution] in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged." *Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949). "In fact the evidence need not conclusively exclude any other reasonable hypothesis nor

negative [sic] all possibilities except guilt." *United States v. Sherman*, 576 F.2d 292, 296 (10th Cir. 1978), *cert. denied sub nom. Cerase v. United States*, 439 U.S. 913 (1978). Even more so "[i]n anti-trust cases, it is deemed essential to develop fully the background of the facts out of which the conspiracy is alleged to have arisen and in the midst of which it operated." *United States v. General Electric*, 82 F.Supp. 753, 903 (D.N.J. 1949).

B. The Supreme Court's *Crawford* Decision Has Not Changed the Admissibility of Coconspirator Statements

The Supreme Court has affirmatively determined that the Confrontation Clause of the Constitution, U.S. Const. amend. VI, does not require a court to inquire into the reliability of coconspirator statements admissible under Rule 801(d)(2)(E). *Bourjaily*, 483 U.S. at 183-84.

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), changed much of the law concerning out-of-court testimonial statements, but it did not affect the admissibility of coconspirator statements. "Because *Crawford* did not overturn *Bourjaily*, the latter continues to control our application of the Confrontation Clause to Rule 801 co-conspirator statements." *United States v. Ramirez*, 479 F.3d 1229, 1249 (10th Cir. 2007).

C. Principles for Determining the Existence of and Membership in the Criminal Conspiracy

1. Both Direct and Circumstantial Evidence Can Be Considered

Although the conspiracy must be proved by a preponderance of the evidence in order for the coconspirator hearsay exception to be available, it need not be proved by direct evidence. "The nature of the offense of conspiracy with its attendant aspects of secrecy, often requires that elements of the crime be established by circumstantial evidence." *United States v. Andrews*, 585

F.2d 961, 964 (10th Cir. 1978); *United States v. Bucaro*, 801 F.2d 1230, 1232 (10th Cir. 1986) (citations omitted) (existence of a conspiracy may be inferred from circumstantial evidence).

2. The Court May Consider the Proffered Statement Themselves

A district court may consider the proffered statements themselves in determining the existence of a conspiracy, and a defendant's participation in it. *Bourjaily*, 483 U.S. at 180; *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987).

3. Direct Testimony of a Coconspirator is Independent Evidence of the Conspiracy

Most Circuits, including the Tenth Circuit, "require some reliable corroborating evidence apart from the coconspirator's statements before those statements may be used." *United States v. Rascon*, 8 F.3d 1537, 1541 (10th Cir. 1993) (citations to decisions of various Circuits omitted); *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979). The Tenth Circuit has defined "independent evidence" as "evidence other than the proffered statements themselves." *United States v. Martinez*, 825 F.2d 1451, 1451 (10th Cir. 1987). Independent evidence may be sufficient even when it is not substantial. *Rascon*, 8 F.3d at 1541. The direct testimony of a coconspirator constitutes "sufficient independent evidence of the existence of a conspiracy." *United States v. Smith*, 692 F.2d 693, 698 (10th Cir. 1982).

D. Requirements for Membership in a Conspiracy

The United States need not prove that a defendant knew each and every detail of the conspiracy or played more than a minor role in the conspiracy. As the Supreme Court has said:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense . . .The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other . . . If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas v. United States, 522 U.S. 52, 63-64 (1997) (citations omitted).

A defendant may be found to have participated in a conspiracy even if he joined or terminated his relationship with others at a different time than another defendant or coconspirator. *Andrews,* 585 F.2d at 964. "[S]tatements made during the course of and in furtherance of a conspiracy, even in its embryonic stages, are admissible against those who arrive late to join a going concern." *United States v. Potts*, 840 F.2d 368, 372 (7th Cir. 1987) (citations omitted).

A district court may consider the conduct, knowledge, and statements of the defendant and others in establishing participation in a conspiracy. *United States v. Gutierrez*, 576 F.2d 269, 273-74 (10th Cir. 1978) (defendant's presence during part of conversation concerning transaction that was part of conspiracy coupled with completion of the transaction unquestionably identified the defendant as a member of the conspiracy for purposes of admission of coconspirator statements).

Finally, once a conspiracy is established, "there need only be some independent evidence linking the defendant to the conspiracy." *Martinez*, 825 F.2d at 1453; *Andrews*, 585 F.2d at 964 (only slight evidence is required to connect a co-conspirator).

E. Statements Made During the Course of and in Furtherance of the Conspiracy

Once the existence of the conspiracy and membership in that conspiracy of both the defendant and the declarant is established by a preponderance of the evidence, statements made "during the course" and "in furtherance" of the conspiracy are admissible pursuant to Rule 801(d)(2)(E). As long as the declarant and the person against whom the statement is offered were members of the conspiracy when the statement was made, the statement need not have been made to a person who was ever a member of the conspiracy. *United States v. Williamson*, 53 F.3d 1500, 1520 (10th Cir. 1995).

It has long been the rule of the federal courts that a statement is made "during the course" of the conspiracy when the statement "was made while the plan was in existence and before its complete execution or other termination." *See* 5 Weinstein's Federal Evidence (Second Edition) § 801.34[4][a] at 801-82 - 801-83 (2003). All of the coconspirator statements in the United States' proffer were made between June 2005 and December 2005, the timeframe of the conspiracy as alleged in the Indictment.

Statements are "in furtherance" of the conspiracy and therefore admissible under the coconspirator exception if they are intended to promote the conspiratorial objectives. *United States v. Reyes*, 798 F.2d 380, 384 (10th Cir. 1986); *United States v. Townley*, 472 F.3d 1267, 1273 (10th Cir. 2007) (citing *Reyes*); *United States v. Sinclair*, 109 F.3d 1527, 1534 (10th Cir. 1997); *United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993). The statements do not have to actually further the conspiracy. It is enough that the statements are intended to promote

the conspiratorial objectives. *Reyes*, 798 F.2d at 384. When determining "whether a statement was made in furtherance of a conspiracy, the focus is on the declarant's intent in making the statement." *United States v. Roberts*, 14 F.3d 502, 515 (10th Cir. 1993) (citations omitted). Whether a particular statement tends to advance the objectives of the conspiracy is determined by examination of the context in which it is made. *Perez*, 989 F.2d at 1579 (*citing Weinstein's Evidence* at 801-318 to -323).

The proffered coconspirator statements in Exhibit A fall into several widely recognized categories of statements that have been held to be statements "in furtherance" of a conspiracy. They include statements made: (1) to execute or transact the business of the conspiracy; (2) regarding the activities of the conspiracy; (3) to recruit potential coconspirators; (4) to reassure members of a conspiracy's continued existence; (5) identifying other members of a conspiracy and their roles; and (6) to conceal the activities of the conspiracy.

1. Statements Made to Execute or Transact the Business of the Conspiracy

Statements made by coconspirators to conduct the business of the conspiracy and to accomplish its goals are "classic examples of statements made to conduct and further" a conspiracy. *United States v. Cox*, 923 F.2d 519, 527 (7th Cir. 1991). Statements in this category found to be "in furtherance" include: statements of future intent that set transactions to the conspiracy in motion and maintain the information flow among coconspirators, *Roberts*, 14 F.3d at 515; statements that prompt the listener to act in a manner that facilitates the carrying out of the conspiracy, *United States v. Smith*, 833 F.2d 213, 219 (10th Cir. 1987); statements made to

prompt further action on the part of conspirators, *Perez*, 989 F.2d at 1578 (citations omitted); and statements made to facilitate meetings, *United States v. Caro*, 965 F.2d 1548, 1557 (10th Cir. 1992).

Examples of statements made to execute or transact the business of the conspiracy from Exhibit A include: 2, 6, 9, 12, 15, 23, and 26.

2. Statements Regarding the Conspiracy's Activities

Statements made to keep coconspirators abreast of an ongoing conspiracy's activities satisfy the in furtherance requirement. *Perez*, 989 F.2d at 1578; *Roberts,* 14 F.3d at 515 (*citing United States v. Yarbrough*, 852 F.2d 1522, 1535-36 (9th Cir 1988)). Statements explaining events important to the conspiracy to one of its members in order to facilitate the conspiracy are in furtherance of the conspiracy. *Reyes*, 798 F.2d at 384; *Townley*, 472 F.3d at 1273. Statements regarding a coconspirator's failure to fully accomplish the objective of the conspiracy are admissible as updates on the status of the conspiracy and how that status affects the future of the conspiracy. *United States v. Doyle*, 771 F.2d 250, 256 (7th Cir. 1985).

Examples of statements regarding the conspiracy's activities from Exhibit A include: 4 and 18.

3. Statements to Recruit Potential Coconspirators

Statements made to recruit potential members of the conspiracy are made "in furtherance" of the conspiracy. *Perez*, 989 F.2d at 1578; *United States v. Johnson*, 4 F.3d 904, 914 (10th Cir. 1993).

An example of a statement to recruit potential coconspirators from Exhibit A is: 1.

4. Statements to Reassure Members of a Conspiracy's Continued Existence

"Statements between coconspirators which provide reassurance, which serve to maintain trust and cohesiveness among them, or which inform each other of the current status of the conspiracy, further the ends of the conspiracy and are admissible so long as the other requirements of Rule 801(d)(2)(E) are met." *United States v. Gomez*, 810 F.2d 947, 953 (10th Cir. 1987) (citation omittted). *Perez*, 989 F.2d at 1578.

Examples of statements made to reassure members of a conspiracy's continued existence from Exhibit A include: 4 and 17.

5. Statements Identifying Other Members of a Conspiracy and Their Roles

Statements made by a coconspirator that identify a fellow conspirator are made in furtherance of the conspiracy. *Townley*, 472 F.3d at 1273; *Williamson*, 53 F.3d at 1520; *Smith*, 833 F.2d at 219.

An example a of statement identifying other members of a conspiracy and their roles from Exhibit A is: 8.

6. Statements to Conceal the Criminal Activities of the Conspiracy

Finally, statements made to conceal the criminal objectives of the conspiracy are made "in furtherance" of the conspiracy where, as here, ongoing concealment is one of its purposes. *United States v. Wolf,* 839 F.2d 1387, 1393 (10th Cir. 1988).

Examples of statements made to conceal the criminal activities of the conspiracy from

Exhibit A include: 14, 17, 24, 25 and 28.

F. Coconspirator Statements Are Admissible Against All Conspirators

Once admitted pursuant to Rule 801(d)(2)(E), a statement of a coconspirator is admissible against all other conspirators, including those who joined the conspiracy after the statement was made. "[A] party may join an ongoing conspiracy during its progress and become criminally liable for all acts done in furtherance of the scheme." *Andrews*, 585 F.2d at 964; *See also United States v. Brown*, 943 F.2d 1246, 1255 (10th Cir. 1991); *United States v. United States Gypsum Co.*, 333 U.S. 364, 391-93 (1948). Because a conspiracy is regarded as a "partnership in crime," *Pinkerton v. United States*, 328 U.S. 640, 644 (1948) (*citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940)), each member of a conspiracy, whenever he acts or speaks to further the common illegal objective, is considered the agent of all the others and is substantively liable for all acts and declarations of coconspirators made in furtherance of the conspiracy. *See e.g. Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974). Thus, under the agency principle of ratification, statements made during the embryonic stages of a conspiracy are admissible against any defendant who arrived later in the conspiracy. *See Potts*, 840 F.2d at 372. A defendant does not have to be a party to the coconspirator statement. As long as the defendant was a member of the conspiracy, statements made by his coconspirators in furtherance of the conspiracy are admissible against him. *United States v. Garcia*, 994 F.2d 1499, 1503 (10th Cir. 1993).

G. Admissibility of Documents Containing Coconspirator Statements

The United States also intends to offer into evidence bids and other documents prepared

during the course of and in furtherance of the conspiracy that contain coconspirator statements. Coconspirator statements, admissible pursuant to Rule 801(d)(2)(E), include not only oral statements, but also documents prepared by coconspirators during the course of and in furtherance of a conspiracy. *See, e.g.*, Fed. R. Evid. 801(a); *United States v. Occhipinti,* 998 F.2d 791, 801 (10th Cir. 1993) *United States v. De Gudino*, 722 F.2d 1351, 1356 (7th Cir. 1984); *See also United States v. Mower*, 351 F. Supp. 2d 1225, 1228 (D. Utah, Central Division 2005). In deciding whether coconspirator statements in documents were made "during the course of and in furtherance of the conspiracy" under Rule 801(d)(2)(E), the court can consider circumstantial evidence, including the content of the documents, the location in which they were found, handwriting on the documents, and conformity of information in the documents with information otherwise in evidence. *See, e.g., United States v. DeLuna*, 763 F.2d 897, 909 (8th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1338-39 (8th Cir. 1985), *cert. denied sub nom. Milburn v. United States*, 474 U.S. 994 (1985); *De Gudino*, 722 F.2d at 1356.

Examples of documents that contain coconspirator statements in Exhibit A are: 30, 31, 32 and 33.

IV. Alternative Bases for Admissibility of Statements

The statements of coconspirators set forth in this proffer should be admitted as non-hearsay under Rule 801(d)(2)(E). Additionally, however, many of these statements are admissible on alternative grounds including: the defendants' own statements admissible pursuant to Rule 801(d)(2)(A); statements made by an agent of the defendant admissible pursuant to Rule 801(d)(2)(D); business records admissible pursuant to Rule 803(6); and false statements

admissible pursuant to Rule 801(c) because they are not offered for the truth of the matter asserted. Accordingly, statements by coconspirators may be admitted against the defendants in many instances without establishing the factual predicate required by Rule 801(d)(2)(E).

A. Defendants' Own Statements Pursuant to Rule 801(d)(2)(A)

A defendant's own statements are admissible against him pursuant to Federal Rule of Evidence 801(d)(2)(A), without reliance on the coconspirator rule. *United States v. Lang*, 364 F.3d 1210, 1222 (10th Cir. 2004) (*vacated*, on *Booker* sentencing issues, *Lang v. United States*, 543 U.S. 1108 (2005) (*reinstated*, *United States v. Lang*, 405 F.3d 1060, 1062 n. 1) (no need to determine whether statements were coconspirator statements because the statements were also admissible as admission of a party-opponent). Therefore, any relevant statement made by either Smith or Martin is also admissible against the defendant who made the statement pursuant to Rule 801(d)(2)(A). *United States v. Gonzalez-Montoya*, 161 F.3d 643, 648-49 (10th Cir. 1998) (testimony of a coconspirator to statements made by the defendant admissible as admission of a party-opponent). A defendant's own admissions, moreover, are relevant to establishing the factual predicates for the admission of coconspirator statements against him. *Caro*, 965 F.2d at 1557.

B. Agency Admissions Pursuant to Rule 801(d)(2)(D)

Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Thus, out-of-court statements by agents of a defendant may come into evidence as non-hearsay admissions against

the defendant principal, provided the agent's statement was made within the scope of the agency or employment.

Throughout the conspiracy to rig bids, Defendants Smith and Martin acted as agents for Defendant B&H. "It is clear that a corporation is criminally liable for the unlawful acts of its agents, provided that such conduct is within the scope of the agent's authority, actual or apparent." *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984). Defendant Smith has final approval of all bids submitted by B&H's Bloomfield office and Defendant Martin was involved in the bidding process at B&H and actually submitted the rigged bids to BP America. Given their positions and job responsibilities, any statements made by either Smith or Martin within the scope of their employment are also admissible against Defendant B&H pursuant to Rule 801(d)(2)(D). *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321-22 (4th Cir. 1982); *United States v. Shunk*, 881 F.2d 917, 921 (10th Cir. 1989) (witness acted as agent of his brother in sale of gun to undercover police); *United States v. Paxson*, 861 F.2d 730, 734 (D.C. Cir. 1988) (defendant convicted of false declarations before a grand jury and obstruction during the investigation of an antitrust conspiracy relating to bid rigging by electrical contractors based on testimony of employee who was deemed the agent of the individual defendant as well as the company).

Here also, Landon Martin, as Smith's subordinate at B&H, is considered an agent of Smith in addition to being his coconspirator. Therefore, in addition to being admissible as coconspirator statements, Martin's statements are also admissible against Smith pursuant to Rule 801(d)(2)(D) as statements of an agent of a party. *United States v. Young*, 736 F.2d 565, 567-68

(10th Cir. 1983) (per curiam) *rev'd on other grounds*, 407 U.S. 1 (1985) (statement by employee of the corporation is an admission of an agent of the company and can be offered against corporate officers); *Paxson*, 861 F.2d at 734.

C. Business Records Pursuant to Rule 803(6)

Federal Rule of Evidence 803(6) allows the admission of records of events or acts, made at or near the time of the act or event, by a person with knowledge of it, if the record is kept in the course of a "regularly conducted business activity" and if it is the ". . . regular practice of that business activity to make the record." These facts can be shown by the custodian of the document, and admissibility does not depend on availability of the author. Fed. R. Evid. 803(6); *In re Japanese Elec. Products Antitrust Litig.*, 723 F.2d 238, 288-89 (3d Cir. 1983), *rev'd. on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The "regular practice requirement" is construed generously to favor admission. *Id.* Moreover, the records can be part of a regularly conducted business activity even if the business activity violates the law. *See e.g., United States v. Kasvin*, 757 F.2d 887, 892-93 (7th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985) (ledger used in drug conspiracy held admissible as business record). Thus, many of the documents containing coconspirator statements are also admissible as business records under Rule 803(6).

D. False Statements

In this case, the United States will seek to introduce certain false statements of Defendant Smith. (See Exhibit A # 21). Because these statements are not being offered for the truth of the matters asserted, they are admissible non-hearsay. Rule 801(c).

V. Conclusion

The evidence set forth in Section II and Exhibit A of this Proffer establishes, by a preponderance, that the conspiracy alleged in Count One of the Indictment existed, that each Defendant was a member of it, and that certain statements were made in furtherance of the conspiracy. This Proffer therefore provides the Court with a blueprint by which to admit coconspirator statements.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2007, I electronically filed the "United States' James Proffer Pursuant to Rule 801(d)(2)(e)" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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